The Malayan Law Journal

1958

Reports

Re TAN GHEE KOOI, DECD.; KHAW PHAIK GUAT & TAN CHEE POH PETITIONERS.

[O. C. J. (Shepherd J.) June 26, 1957]

[Penang — Summons-in-Chambers No. 129 of 1957 in Probate No. 9 of 1956]

Probate and Administration Ordinance (S.S. Cap. 51), s. 28(2) — Dispensation of sureties — Practice in Penang — Duty of Court.

It is the duty of the Court to see that the estate is administered under circumstances which make it conducive to an administration conducted in accordance with law, and it is not implied automatically, that with the consent of adult beneficiaries there will be dispensation of sureties.

In this case where all the assets were personal assets the learned Judge did not consider sufficient reason had been shown for the dispensation of sureties and the application was dismissed.

Practice regarding the dispensation of sureties in the Settlement of Penang discussed.

Cases referred to:—

(1) *In the Goods of Paton* (1901) P. 188.

(2) *In the Estate of Harper* (1909) P. 88.

(3) *In the Goods of Rushworth* 25 T.L.R. 128.

(4) *In the Goods of Cory* (1903) P. 62.

(5) *In the Estate of H. M. Chulalongkorn, King of Siam* 107 T.L.R. 589.

(6) *Cambiaso v. Negrotto* 22 Add. 439; 162 E.R. 356.

SUMMONS-IN-CHAMBERS adjourned into Open Court.

Tan Lye Huat for the petitioners.

Shepherd J. (delivering Oral judgment): — This is an application for dispensation of sureties by way of summons-in-chambers by the two petitioners Khaw Phaik Guat and Tan Chee Poh the widow and brother respectively of Tan Ghee Kooi, deceased, who died on the 27th November, 1955, nearly 18 months ago, intestate and domiciled in the Settlement of Penang. The deceased left surviving him his widow and five infant children. The application was adjourned into Court for argument as I thought it would be a matter of interest to go into the law and practice regarding the dispensation of sureties in the Settlement of Penang.

The first point to note is that a Grant is made by the Court for administration of the estate according to law. This is made perfectly plain in the Administration Oath, Form 70A, which has to be taken by the grantee and in the Administration Bond, Form 70B, by which the grantee binds himself to Her Majesty the Queen in a sum which must be the gross value of the estate until the terms of the bond have been complied with. In this case it was stated that insurance companies would not stand as sureties, so the Solicitor for the applicants was not able to take advantage of the provisions of the practice noted under section 28 of the Probate and Administration Ordinance (Cap. 51 of the Laws of the Straits Settlements) in *Mallal's* Straits Settlements Practice (p. 916), whereby the Registrar is empowered to dispense with all sureties, except one in the event of a British insurance company agreeing to act as a surety to the bond. It was later stated by Mr. Tan Lye Huat when the case came before me in open Court that a certain insurance company on certain terms would agree to act as surety, but I considered it my duty to deal with the application before me in a manner which I felt to be in the interests of the infant beneficiaries themselves, and Mr. Tan Lye Huat agreed that it was proper for me to do so. It has been suggested that in these cases the dispensation is in the discretion of the Court; and this is perfectly true, because section 28(2) of the Ordinance provides:—

> "28. (2) The security shall ordinarily be by bond in the prescribed form by the grantee and two sureties in the amount at which the estate within the jurisdiction is sworn, without deduction of any debts due by the deceased, other than debts secured by mortgage; but the Court or a Judge or any Registrar whom the Chief Justice may specially appoint for that purpose may for any sufficient reason increase or decrease the number of the sureties; or dispense with them, or reduce the amount of the bond."

The estate is wholly comprised of personal assets including 25 shares in the Straits Echo Press (1951) Ltd. (a readily realisable security), cash in the Oversea Chinese Banking Corporation Ltd. and in the Mercantile Bank Ltd., a small Fiat car valued at $3,800 and various outstanding claims in respect of salary and death benefits, all amounting to nearly $39,000. The only liability is stated to be some funeral expenses, which have been paid by the applicants, but, of course, one cannot be sure about liabilities until creditors have been invited by advertisement to apply. In this case there is no question of an adult beneficiary giving his consent. All the beneficiaries, except the widow, who would be the principal surety to the bond, are infants, but I observe in passing that it is the duty of the Court

to see that the estate is administered under circumstances which make it conducive to an administration conducted in accordance with law, and I cannot say that it is implied automatically, that with the consent of adult beneficiaries there will be dispensation of sureties. It was suggested by Mr. Tan Lye Huat that if there had been adult beneficiaries and they had consented then the applicants must have been entitled to an order for the dispensation of sureties as a matter of course; but when I asked him if he could show me any authority for that proposition he stated that he had searched for authorities but could find none. Indeed there is none and could be none, because I think it would be contrary to the obvious statutory duty of the Court and to its traditional duty if it traded what might be termed free passes or indemnities in exchange for an order for dispensation of sureties. Many of these consents are dubious in the manner of attestation or authentication and nearly all the signatories are completely ignorant people. The duty of the Court, as I see it, is to satisfy itself that there are sufficient reasons as stated above.

The practice in the Settlement appears to be much as it was in England when the Probate and Letters of Administration Act, 1857 was in force and it is clear, I think, from some of the authorities which I shall quote that the Court's discretion was only exercised in very exceptional cases. Application under that Act was incidentally always by way of motion and according to the Straits Settlements Practice the application in the Settlements should be by way of originating summons. It seems to me that procedure under Straits Settlements Order 54 by way of notice of motion is more appropriate as the legislation in the Settlements in this respect approximates to the legislation in England before the codified legislation of 1926 was passed.

In England, so far as I can see, the authorities would seem to suggest that there are, perhaps, only three categories of cases in which dispensation can properly be granted. These may be summarised as follows:—

Firstly, cases in which the applicants being the legal personal representatives are by way of being also the residuary legatees, and in that category of case I may mention the case of *In the Goods of Paton*[1] and also the case of *In the Estate of Harper*[2].

Secondly is the class of case (which I will call the "little businesses" cases); and this is the class of case which seems to me to be appropriate to the class of case which may come most frequently before the Courts in the Federation of Malaya. I will not go into details, but the cases of *In the Goods of Rushworth*[3] and *In the Goods of Cory*[4] are cases in point. In each case the applicant was a widow with young children and her only hope of subsisting at all was to be allowed to carry on a small business of the deceased without the necessity of making a distribution in accordance with law, (one was a blacksmith's business and the other a whitedraper's). In such a case it seems, as an exception, the Court would grant dispensation on the tacit understanding that by so doing it gives a free pass or a blank cheque to the widow to carry on the business as best she can without making a distribution in accordance with law. The Court must be satisfied that provision has been made or would be made for the payment of creditors. That seems to me to be the class of case in which Courts in this country might well dispense with sureties. (It is not likely that the business would be a whitedraper's or a blacksmith's, but it might well be a small rubber or coconut planting business).

The third category of case is perhaps what I might call appropriately "the foreign cases" where, for special reasons connected with the relationship of this country with another country it is desirable to dispense with sureties. The English case of *In the Estate of H. M. Chulalongkorn, King of Siam, deceased*[5], where dispensation was granted upon an application by the attorney of the Sovereign of Siam is a case in point. In passing reference may also be made to the case of *Cambiaso v. Negrotto*[6]. In that case it was considered appropriate by the Court in England to dispense with sureties as the applicant was the committee of a lunatic living in Genoa and had probably provided a bond in that country; and there were also other relevant circumstances e.g. the lunatic was the sole beneficiary of the estate.

There are no doubt many other cases besides these three broad categories and I do not wish to appear dogmatic. Suffice it to say that in the present case where all the assets are personal assets I do not consider sufficient reasons have been shown for the dispensation of sureties and the application is dismissed. But the matter does not end there. The application suggested that a Court official together with the petitioners should be responsible for the safe custody of certain of the assets, namely the liquid assets (or a portion thereof) by going into a complicated procedure connected with the deposit of moneys in the Post Office Savings Bank. No doubt this was appropriate many years ago when an officer (the Official Administrator) had not been appointed expressly to assist the Court in these matters and where possibly the only assets would be a small sum of money and this was to be paid to the infant beneficiaries on their coming of age. I cannot see that this antiquated and cumbersome procedure can be appropriate today in circumstances such as these

Suffice it to say, therefore, that after full consideration and having consulted the Public Trustee (the Official Administrator would prefer to act in this other of his capacities in this case) and with his consent I have decided of my own motion to revoke the Grant, to order that a Grant for the due administration of the estate of the deceased should issue to the Public Trustee. The Public Trustee will, of course, file his consent within the next few days and that will form part of the Court record.

The order will be that the petition granted on the 21st June, 1956 be revoked, that accounts be filed by the grantee who had not extracted the grant but had continued to act and that the balance be paid to the Assistant Public Trustee, Penang. There will be an order revoking the Grant and making a Grant to the Public Trustee as stated above. An order that accounts be filed by the applicants herein and the balance found due paid to the Assistant Public Trustee, Penang within one month, the Assistant Public Trustee's receipt being a full and sufficient discharge. Liberty to apply. The Assistant Public Trustee to charge the usual statutory fees and deduct his proper expenses.

Application dismissed.

Solicitor: *Lee Thean-Chu.*

PUBLIC PROSECUTOR v. SAJJAN SINGH

[A. Cr. J. (Hepworth J.) July 9, 1957]
[Malacca — Criminal Appeal No. 8 of 1957]

Penal Code s. 193 — Giving false evidence — Sanction of Deputy Public Prosecutor — Criminal Procedure Code (Cap. 21), ss. 138(1)(d) & 139(1)(b).

In this case the record of a civil suit in the High Court was transmitted to the Deputy Public Prosecutor by the trial Judge to consider the evidence and whether or not the accused should be charged with an offence under section 193 of the Penal Code. The Deputy Public Prosecutor having considered the matter issued a sanction under section 139(1)(b) of the Criminal Procedure Code (Cap. 21). The accused was thereupon charged in Court. The learned President acquitted the accused, one of his grounds being that no proper complaint had been filed.

Held: the effect of the provisions of section 138(1)(d) of the Criminal Procedure Code (Cap. 21) is that once the accused is before the Court there is jurisdiction to try him and the Judge is not concerned with how he got into the dock.

Cases referred to:—

(1) *R. v. Syed Mohamed bin Tahir Allhabshee* 3rd Singapore Assizes, 1931 — unreported.

(2) *Lee Sang Cheah v. R.* (1946) M.L.J. 22.

MAGISTRATE'S CRIMINAL APPEAL.

L. A. Massie (Federal Counsel) for the appellant.

R. P. S. Rajasooria for the respondent.

Hepworth J.: — The Petition sets out concisely the points arising on this Appeal and I shall take these points in the order in which they appear in the Petition.

The first ground of appeal is that the learned President was wrong in holding that he had no jurisdiction to try the case. This does not appear to have been argued before him and he states no reason or authority for coming to this conclusion. In view of the provision of section 63 of the Courts Ordinance, 1948, it is difficult to see how the learned President came to such a decision because it is abundantly clear from that section that the Sessions Court has jurisdiction to try an offence under section 193 of the Penal Code.

The second ground of appeal is that the learned President was wrong in holding that the Accused should be acquitted and discharged because no proper complaint was filed. In this case the record of a civil suit in the High Court was transmitted to the Deputy Public Prosecutor by the trial Judge to enable the Deputy Public Prosecutor to consider the evidence and whether or not the Accused should be charged with an offence under section 193 of the Penal Code. The learned Deputy Public Prosecutor, having considered the matter, issued a sanction under section 139(1)(b) of the Criminal Procedure Code to the police to prosecute the Accused under section 193 of the Penal Code. In the case of *R. v. Syed Mohamed bin Tahir Allhabshee*[1], Sproule Ag. C.J., ruled that the sanction of the Deputy Public Prosecutor is sufficient for a charge under section 193 of the Penal Code and that the sanction of the Court is not required, and accordingly the requirements of section 139 of the Criminal Procedure Code were satisfied. The Accused was then brought before the learned President. A perusal of section 138 shows that a Court may take cognisance of an offence, not only upon receiving a complaint, but in the circumstances set out in paragraphs (b), (c) and (d) of sub-section (1) of that section. The effect of the provisions of section 138(1)(d) is that once the Accused is before the Court there is jurisdiction to try him under this section, and thus the learned President was not concerned with how he got into the dock (see footnote to section 138 in *Mallal's* Criminal Procedure, 3rd Edn. at p. 158* and *Lee Sang Cheah v. R.*[2]).

The third ground of appeal is that the learned President was wrong in holding that an opportunity should have been given to the Accused to show cause why he should not be prosecuted before a complaint of perjury could be filed. It would appear that the learned President was confusing the procedure under section 12 of the Oaths and Affirmations Ordinance, 1949, which is only applicable in cases of summary punishment of perjury in open Court and was not applicable in this case.

* See now *Mallal's* Criminal Procedure 4th Ed. p. 177.